



Eugene Hearings Official

Phone: 541-682-5377

www.eugene-or.gov/hearingsofficial

AGENDA

Meeting Location:

Atrium Building – Sloat Room

99 West 10th Avenue

The Eugene Hearings Official welcomes your interest in these agenda items. Feel free to come and go as you please at any of the meetings. This meeting location is wheelchair-accessible. For the hearing impaired, FM assistive-listening devices are available or an interpreter can be provided with 48 hours notice. To arrange for these services, contact the Planning Division at (541)682-5481.

WEDNESDAY, March 19, 2014

(5:00 p.m.)

I. PUBLIC HEARING ON APPEAL OF PLANNING DIRECTOR'S DECISION

OBO Enterprises (MDA 13-7)

Assessors Map: 17-03-32-33

Tax Lot: 400, 500, 600

Decision: Approval of a modification to extend the expiration period of an existing Site Review (SR 11-2) approval to May 30, 2015

Appellant: Paul Conte

Lead City Staff: Becky Taylor, Associate Planner
Telephone: (541) 682-5437
E-mail: becky.g.taylor@ci.eugene.or.us

Public Hearing Format:

1. Staff introduction/presentation
2. Public testimony from applicant and others in support of application.
3. Comments or questions from interested persons who neither are proponents nor opponents of the proposal.
4. Public testimony from those in opposition to application.
5. Staff response to testimony.
6. Questions from Hearings Official.
7. Rebuttal testimony from applicant.
8. Closing of public hearing.

The Hearings Official will not make a decision at this hearing. The Eugene Code requires that a written decision must be made within 15 days of close of the public comment period. To be notified of the Hearings Official's decision, fill out a request form at the public hearing or contact the lead City staff as noted above. The decision will also be posted at www.eugene-or.us/hearingsofficial.

MEMORANDUM

Date: March 12, 2014

To: Ken Helm, Hearings Official

From: Becky Taylor, Associate Planner

Subject: **Appeal of Site Review Modification for OBO Enterprises (MDA 13-7)**

Background

The subject appeal pertains to the Planning Director's approval of a modification to a Site Review (SR 11-2) to extend the expiration period (see Attachment B for the Planning Director's decision.) The Site Review was approved by the Eugene Hearings Official, as it was elevated to a Type III application for concurrent processing with a Zone Change (Z 10-9). The Zone Change was appealed to the Planning Commission, which modified the Hearings Official's decision with an additional condition of approval. The Zone Change was then appealed to LUBA, which upheld the Planning Commission's decision. Although the Site Review approval was not included in the appeal of the Zone Change, the Site Review could not have been implemented without the Zone Change. Based on the concurrent review of the Zone Change and Site Review under the Type III application procedures and the Site Review's contingency on the Zone Change the "effective date of approval" of the site review is June 20, 2012, when LUBA's opinion became final (was not further appealed).

Type III applications have no expiration date. Because the site review was processed as a Type III application, it is arguable that the Site Review has no expiration date. In the event the Type II expiration provisions for Site Reviews apply, the Modification decision relied on EC 9.7230, which establishes an 18-month period following the "effective date of approval" for either filing a development permit or a modification to extend the expiration date. December 20, 2013 is 18 months from June 20, 2012; the applicant filed the modification on November 27, 2013, in advance of the expiration period. The applicant requested, and the Planning Director approved, the Modification to extend the expiration date of the Site Review to May 30, 2015.

Notice and Appeal

On February 13, 2014, notice of the decision granting the modification approval (MDA 13-7) was provided in accordance with the Type II application procedures at EC 9.7220. On February 25, 2014, Paul Conte filed an appeal of the Planning Director's decision. Mr. Conte's statement of issues on

appeal was prepared by his attorney, William Kabeisman (see Attachment A). The appeal statement identifies nine assignments of error, which are outlined below and include staff's response. The public hearing for this appeal is scheduled for March 19, 2014 and public notice of the appeal hearing was mailed in accordance with applicable code requirements on February 27, 2014. As described in the public notice, the decision on this modification appeal is subject to the procedural requirements of EC 9.7600 through 9.7635, and the public hearing for this appeal will be conducted according to quasi-judicial hearing procedures in state law and described at EC 9.7065 through 9.7095. Pursuant to EC 9.7630, the HO shall affirm, reverse, or modify the Planning Director's modification approval. EC 9.7630(2) clarifies that the HO can only reverse or modify the Planning Director's decision if he finds that the Planning Director failed to properly evaluate the application or make a decision consistent with the approval criteria.

Since the submittal of the appeal, staff has received no additional testimony in response to the public notice. Any written testimony or other evidence submitted between the date of this memorandum and the appeal hearing will be forwarded for consideration as part of the decision on this appeal. In addition to any public testimony or other evidence that may be forwarded or presented at the upcoming public hearing, please review the attached items from the application file.

Appeal Issues and Staff Response

The appellant identifies seven assignments of error in the written appeal statement, which are summarized below (in **bold**), followed by staff's response.

- 1. The Planning Director's decision incorrectly determines that the Site Review approval had not expired and that the application to modify the Site Review approval was therefore timely filed under EC 9.7010 and EC 9.7230(6). The application to modify the Site Review approval was not properly filed until December 2, 2013, well after the Site Review approval had expired and the applicable time to file for an extension had elapsed.**

The appellant appears to be relying on the date the HO approved the Site Review to begin the running of the 18-month clock, rather than on the date the concurrent Zone Change was resolved through the appeals process. Staff has already explained how the Site Review approval was intertwined with the Zone Change.

The discrepancy of the December 2, 2013 filing cited by the appellant and the November 27, 2013 date acknowledged by staff as the date the applicant filed the Modification application has to do with the difference between submittal of the application and deeming the application complete; the appellant relies on the latter date because the application form was not signed by the applicant, nor was the filing fee paid, until December 2, 2013. Staff determined the signature and fee to be items of completeness. Nevertheless, even if the application was not "properly filed" until December 2, 2013, this was well in advance of the December 20, 2013 date recognized by staff as being the expiration date of the Site Review.

- 2. The Planning Director's decision incorrectly finds that the application was filed on November 27, 2013, under EC 9.710 and EC 9.7230(6), as the application material, which is signed and dated December 2, 2013, was not property filed until December 2, 2013.**

This is addressed in the first appeal issue, above.

- 3. The Planning Director's decision incorrectly determines that the Site Review "effective date of approval" was the date that "LUBA's decision became final" for zone Change Z 10-9, which is contrary to both Eugene Code, the City's own notice of Hearings Official decision for SR 11-2, applicable statutes and case law. The review of the separate zone change decision did not affect the effective date of the Site Review approval.**

The appellant has not explained the contrary components of Eugene Code, notice, statutes, and case law.

- 4. The Planning Director's decision incorrectly determines that LUBA's decision for Zone Change Z 10-9 became final on June 20, 2012. The decision was issued on May 30, 2012, and OAR 661-010-0070 makes clear that a LUBA decision is final upon issuance.**

The discrepancy between these two dates is the 21 days for filing an appeal to the Oregon Court of Appeals. Staff determines that any expiration date of an approval would not start running until all appeals are finalized.

- 5. The Planning Director's decision incorrectly finds that the deadline for filing an application for an extension was December 20, 2013, 18 months after June 20, 2012, which the decision erroneously asserts is the date "LUBA's decision became final" for Zone Change Z 10-9. The time to file an application for an extension had expired well before that time.**

Staff has already provided an explanation to this, above.

- 6. The Planning Director's decision incorrectly finds, in the alternative, that the Site Review had no expiration date at all based on erroneous interpretations of EC 9.7230 and EC 9.8005(2). Such an interpretation is inconsistent with the plain language of the code, the decisions themselves, and would also lead to absurd and unreasonable results.**

Staff notes the fact that the concurrent processing of the Site Review with the Zone Change elevated the Site Review to a Type III application, which includes no provisions for expiration. This is the plain language of the code, although the result would be an unusual situation in which there would be no expiration date for the Site Review. The Planning Director's decision on the Modification was based on a typical 18-month expiration date for a Site Review approval.

- 7. The Planning Director's decision improperly dismissed the evidence from its own documents, notices and agreements entered into by the applicant acknowledging the correct expiration date.**

The appellant has not explained what evidence was "improperly dismissed." The decision responded to Mr. Conte's arguments about the Performance Agreement. (See page 5 of the Planning Director's decision, Attachment B).

- 8. The Planning Director's decision improperly relies on LUBA's decision in *Friends of Metolius v. Jefferson County*, 31 Or LUBA 160, (1996), rather than the Court of Appeals decision in *Rest-Haven Memorial Park v. City of Eugene*, 189 Or App 90, 74 P3d 1107 (2003), which is more recent and on-point.**

Staff addressed this issue on pages 3 and 4 of the Planning Director's decision. The appellant has not explained the "improper reliance."

- 9. The decision was not supported by substantial evidence in the record.**

The appellant has provided no explanation regarding this claim.

Staff Recommendation

Based on the available evidence, and consistent with the preceding findings and specific clarifications provided in response to the appeal issues raised, staff concludes that the Planning Director's decision was not in error or otherwise inconsistent with the applicable modification approval criteria at EC 9.8370. The key factor here is that none of the appeal issues relate to the approval criteria at EC 9.8370.

With the additional findings provided by staff and absent additional testimony or evidence to indicate otherwise, as of the date of this report, staff recommends that the Hearings Official affirm the decision of the Planning Director granting modification approval for OBO Enterprises (MDA 13-7).

Attachments

A: Appeal Form and Written Statement

B: Decision of the Planning Director for OBO (MDA 13-7)

The full application file will be made available at the public hearing on this matter, and is otherwise available for review at the Eugene Planning Division offices. Staff is forwarding the Hearings Official a copy of all relevant application materials, testimony and related evidence in the record to date.

For More Information

Please contact Becky Taylor, Associate Planner, Eugene Planning Division, by phone at (541) 682-5437 or by e-mail, at becky.g.taylor@ci.eugene.or.us.



PORTLAND OFFICE
eleventh floor
121 sw morrison street
portland, oregon 97204-3141
TEL 503 228 3939 FAX 503 226 0259

Attachment A
anchorage, alaska
beijing, china
new york, new york
seattle, washington
washington, d.c.
GSBLAW.COM

GARVEY SCHUBERT BARER

A PARTNERSHIP OF PROFESSIONAL CORPORATIONS

Please reply to WILLIAM K. KABEISEMAN
billkab@gsblaw.com
DIRECT DIAL 503 553 3231

February 24, 2014

Eugene Hearings Official
Eugene Planning Division
99 West 10th Avenue
Eugene, OR 97401

Dear Hearings Official:

Please consider this letter a summary "statement of issues on appeal" as required by EC 9.7605(3). The statement of issues also includes the issues identified in the letter from Paul Conte dated January 27, 2014, attached to this statement and included herein.

In addition, as the Planning Director's decision was made without a hearing, ORS 227.175(10)(a) requires the hearing to be *de novo* and serve as the City's initial evidentiary hearing. Accordingly, the appellant reserves the right to raise additional issues and to present additional evidence at that hearing.

Notwithstanding the reservation of the ability to raise additional issues, the appellant provides the following specification of how the planning director's decision in this matter is inconsistent with the applicable criteria:

- A) The Planning Director's decision incorrectly determines that the Site Review approval had not expired and that the application to modify the Site Review approval was therefore timely filed under EC 9.7010 and EC 9.7230(6). The application to modify the Site Review approval was not properly filed until December 2, 2013, well after the Site Review approval had expired and the applicable time to file for an extension had elapsed.
- B) The Planning Director's decision incorrectly finds that the application was filed on November 27, 2013, under EC 9.7010 and EC 9.7230(6), as the application material, which is signed and dated December 2, 2013, was not properly filed until December 2, 2013.
- C) The Planning Director's decision incorrectly determines that the Site Review "effective date of approval" was the date that "LUBA's decision became final" for Zone Change Z 10-9, which is contrary to both Eugene Code, the City's own notice of Hearings Official decision for SR 11-2, applicable statutes and case law. The review of the separate zone change decision did not affect the effective date of the Site Review approval.



GARVEY SCHUBERT BARER

Eugene Hearings Official
 February 24, 2014
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- D) The Planning Director's decision incorrectly determines that LUBA's decision for Zone Change Z 10-9 became final on June 20, 2012. The decision was issued on May 30, 2012, and OAR 661-010-0070 makes clear that a LUBA decision is final upon issuance.
- E) The Planning Director's decision incorrectly finds that the deadline for filing an application for an extension was December 20, 2013, 18 months after June 20, 2012, which the decision erroneously asserts is the date "LUBA's decision became final" for Zone Change Z 10-9. The time to file an application for an extension had expired well before that time.
- F) The Planning Director's decision incorrectly finds, in the alternative, that the Site Review had no expiration date at all based on erroneous interpretations of EC 9.7230 and EC 9.8005(2). Such an interpretation is inconsistent with the plain language of the code, the decisions themselves, and would also lead to absurd and unreasonable results.
- G) The Planning Director's decision improperly dismissed the evidence from its own documents, notices and agreements entered into by the applicant acknowledging the correct expiration date.
- H) The Planning Director's decision improperly relies on LUBA's decision in *Friends of Metolius v. Jefferson County*, 31 Or LUBA 160, (1996), rather than the Court of Appeals decision in *Rest-Haven Memorial Park v. City of Eugene*, 189 Or App 90, 74 P3d 1107 (2003), which is more recent and on-point.
- I) The decision was not supported by substantial evidence in the record.

Sincerely,

Garvey Schubert Barer

A handwritten signature in blue ink, appearing to read "W. K. Kabeiseman".

By

William K. Kabeiseman

WKK:kms
 Enclosure

PDX_DOCS:513997.1

**TESTIMONY RE “OBO ENTERPRISES”
SITE REVIEW MODIFICATION (MDA 13-7) APPLICATION.**

Submitted on January 27, 2014 by:

Paul Conte
1461 W. 10th Ave.
Eugene, OR 97402

This testimony is in opposition to the above referenced application.

This application requests modification of the original approval of “OBO Enterprises (15th & Patterson Apartments)” Site Review (SR 11-2). The application requests the expiration date be changed to May 30, 2015.

The application was filed after the original Site Review approval had expired. The application therefore was not timely filed and must be denied.

CHRONOLOGY AND MATERIAL FACTS

The Original Site Review Application

The original SR 11-2 application was for “needed housing” and was filed concurrently with an Adjustment Review application (ARA 11-6) and a zone change application (Z 10-9).

Site Review applications are “Type II” quasi-judicial decisions. (EC 9.7045, 9.7055 & Table 9.0755. However, because the concurrent zone change was a “Type III” quasi-judicial decision, all three applications were approved by a Hearings Official. Nevertheless, all other provisions of the code continue to apply to each of the concurrent applications (EC 9.8005(2).

Consequently, the SR 11-2 Site Review application is still subject to the expiration provisions for Type II applications at EC 9.7230(1), Table 9.7230 & 9.7230(6), which provide that:

- (1) The planning director’s approval of an application shall expire in 12 months, 18 months, or 36 months from the effective date of approval, depending upon the type of land use application as specified in Table 9.7230 Expiration of Type II Application Approvals, or as provided in subsections (2) through (9) of this section. If an application approval has expired according to any of the conditions stated in subsections (2) through (9), the original application approval is revoked and a new application must be filed.
- (6) Site review and standards review approvals and modifications of such approvals shall be effective for 18 months after the effective date of approval. Within that

time, the applicant shall submit a final plan and an application for a development permit. Prior to the expiration date, the applicant may submit a modification requesting a change to the commencement or expiration time period.

The effective date for a Type II application, including Site Review, is the 13th day after notice of the decision is mailed, unless the decision is appealed (EC 9.7220(6)).

On October 3, 2011, the Hearings Official approved the Site Review with four conditions, *none of which included any condition making the Site Review approval dependent on the zone change that was approved concurrently.*

On the same day, October 3, 2011, the City mailed the "Notice of Hearings Official" [sic], which states:

"Unless appealed pursuant to Eugene Code Sections 9.7655, this Hearings Official decision will be effective when the appeal period has expired. In this case, **any appeal must be received by 5:00 p.m. on October 17, 2011.**" (Bold and underline in original.)

There was no appeal of the Site Review approval, and thus it became effective on October 18, 2011, which was the 13th day after notice of the decision is mailed, as specified in both the applicable code (EC 9.7220(6)) and the City's notice.

On or about November 27, 2012, the City approved a site plan "A1" sheet, dated July 24, 2012 that had been produced by TBG Architect & Planners, Inc. This sheet was stamped "Exhibit B" and initialed by "SRO," which indicates the City planner, Stephen Ochs.

On the same day, November 27, 2012, Gabe Flock, a City senior planner, signed a Performance Agreement which incorporated the aforementioned site plan.

This Performance Agreement was signed and notarized on November 26, 2012 by Nick Boles, as representative of OBO Enterprises LLC, the applicant on the site review application. The notarization certified that Noles "personally appeared ... and executed the same [agreement] freely and voluntarily."

In signing this agreement, both the City and applicant acknowledged and accepted the following written recital:

"4. On October 3, 2011, the Eugene Hearings Official granted site review approval of the Developer's request, contingent upon 4 conditions of approval. While the concurrent zone change (see City file Z10-9) was appealed, the site review decision was not, and the site review application became effective on October 18, 2011. The applicant has complied with all four conditions of approval by providing notes on sheet A1 of the final approved plans for the subject

development. The approved plans are attached as Exhibit “B” and by this reference are incorporated herein.” (Emphasis added.)

In the same document, the applicant made clear he knew and accepted the deadline to meet the conditions for the site review approval:

“NOW THEREFORE, in consideration of the mutual promises and agreements contained herein, as a condition to the granting of site review approval by the City, Developer also agrees as follows:

1. DEVELOPMENT STANDARDS

- a. Time Schedule: Time being of the essence, Developer shall submit a final plat plan and an application for a development permit by April 18, 2013.

Consistent with EC 9.7230(1), Table 9.7230 and 9.7230(6), April 18, 2013 was exactly 18 months after the site review was effective on October 18, 2011.

At the time the City and applicant signed this agreement, both parties had full knowledge of the history and status of the concurrent zone change application. Specifically, both parties were aware that the City’s final decision approving the zone change had been made by the Eugene Planning Commission in their “Final Order” dated November 15, 2011, notice of which was sent to the applicant on November 16, 2011.

Both parties also had full knowledge that this order had been appealed to LUBA, and LUBA had affirmed the City’s final decision on May 30, 2012, notice of which was sent to the applicant’s attorney the same day.

Thus, when both parties agreed that the “the site review application became effective on October 18, 2011,” both parties knew all the relevant details of the approval and appeal history of the site review and zone change applications.

In full knowledge of these facts, the applicant “freely and voluntarily” agreed that, as a condition of approval of the site review, he was required to “submit a final plat plan and an application for a development permit by April 18, 2013.”

The applicant did not submit either a final plat plan or a development permit by the codified and agreed upon date, and consequently the SR 11-2 Site Review approval expired on April 19, 2013.

During the entire 3½ months after the Performance Agreement was signed until the expiration of the site review approval, there is no evidence that the applicant contested the recital and condition of approval to which he had agreed.

Furthermore, even though the applicant understood and agreed that the deadline for meeting the conditions of approval was April 18, 2013, he chose to not file an application to provide more time to comply, as provided for under EC 9.7230 (6):

“Prior to the expiration date, the applicant may submit a modification requesting a change to the commencement or expiration time period.”

Thus, at any time during the 3½ months after he signed the Performance Agreement, the applicant could have contested the agreed upon SR 11-2 effective date, applied for an extension and/or complied with the conditions of approval.

The applicant took none of those actions and has no legal basis now to retroactively change the site review expiration date. Further, his contesting of the site review effective date, to which he “freely and voluntarily” agreed is too late and cannot be considered in any case.

If the Planning Director allows the applicant in this case to contest a land use approval expiration date – *to which he has formally agreed* – some seven months after the expiration date has passed, the result would be unreasonable because other applicants could make similar claims potentially years after the expiration date. (Statute should not be construed to ascribe to legislature intent to produce unreasonable or absurd result. *State v. Galligan*, 312 Or 35, 816 P2d 601 (1991).)

There was also no notice given by the City that it intended to change the site review expiration date retroactively. If the applicant had submitted the final plat plan and development permit by the altered expiration date, none of the interested parties in this case would have even known about the action.

Thus, before approving this application, the Planning Director must explain the legal basis that allows the City to change land use expiration dates after the fact and with no public notice.

The Erroneous Claim that the Site Review Effective Date is the Date LUBA Affirmed the Zone Change

City staff assert that the correct effective date for SR 11-2 was the date LUBA affirmed the City’s approval of the related zone change Z 10-9.

Despite repeated requests for the Eugene Code or statutory authority upon which this claim is based, both Steve Ochs, the planner assigned to this application, and Anne Davies, the Assistant City Attorney, have refused to provide a single explanation other than the amorphous statement that:

“... practically speaking, the applicant could not act on, or proceed with the site review approval until the outcome of all zone change appeals had been finally resolved. Based on a review of state law on similar situations, the site review effective date should have been 18 months from the date all appeals of the zone change had been completed. Based on this, we revised the performance agreement to reflect the new date.” – e-mail from Steve Ochs, January 10, 2014.

This interpretation conflicts with both Eugene Code and case law.

First, the City's justification, above, relies on "*practically speaking*," as if this were some meaningful legal standard, which it is not. The simple fact is that, as explained above, the site review approval became effective on October 18, 2011. This fact was acknowledged in a notarized agreement by both the applicant and City.

LUBA has also made clear that the site review's effective date is not delayed, unless the site review approval has some language that would make the effective date conditional on the final resolution of all appeals of a separate zone change decision.

"A condition of site plan approval that calls for mediation to develop possible mitigation measures for an asphalt recycling plant does not delay the effective date of the decision where there is no language in the condition that suggests that was the local governments intent and the notice of the decision states that the decision can be appealed to LUBA." *Clearwaters v. Josephine County*, 50 Or LUBA 600 (2005).

This site review approval had no conditions, explicit or otherwise, that required all appeals of the zone change to be resolved before the applicant could "act on, or proceed with the site review approval." Not only is this fact established in the text of the Hearings Official's decision, it's also demonstrated by Recital 4 in the original performance agreement, which stated:

"The applicant has complied with all four conditions of approval by providing notes on sheet A1 of the final approved plans for the subject development." (Emphasis added.)

Thus, all the applicant was required to do to "proceed with the site review approval" was to make four notations on one sheet of the site plan. These notations could have been done on the day the site review became effective (October 18, 2011) or any time later. There was no legal or practical barrier to such action. The City's claim has no merit at all.

Even if the City's argument were valid, and it is not, the related zone change became effective upon the City's final decision, i.e., the final order of the Eugene Planning Commission, which occurred November 15, 2011.

At that time, the subject property was zoned R-4/92/SR; and, even if the site review approval were dependent in any way upon that zoning (and it was not), the dependency was fully satisfied and the applicant could have proceeded, not only with the site review approval, but also with filing final plans and building permits, as well.

It is settled law that a LUBA appeal doesn't in-and-of-itself delay or suspend the City's final decision on a zone change, and nothing in this case changes that fact.

Coincidentally, City Attorney Glenn Klein confirmed the City's agreement with this legal fact when he was discussing a separate case at the January 15, 2014, Eugene City Council work session:

"But a LUBA appeal also ... the existence of a LUBA appeal does not legally prevent the property owner from obtaining a building permit based on the action that the Planning Commission already took. Unless LUBA issues a stay of the Planning Commission's action, the Planning Commission's action is final, and people can go get a building permit based on that.

... So, the existence of a LUBA appeal is a risk potentially for the property owner, and so most people will not go get building permits if there's a pending LUBA appeal, but legally they could."

This statement by the City Attorney directly contradicts Planning staff claims.

Thus, before approving this application, the Planning Director must explain the inconsistency between the City Attorney's statement to the elected officials and the Planning staff claim. *Ibid.*

The City Attorney's statement is accurate and consistent with prior court decisions. As just one example, in *Rest-Haven Memorial Park v. City of Eugene*, 189 Or App 90, 74 P3d 1107 (2003), the Court of Appeals found as follows:

"We begin with petitioners' argument that the 12-month expiration should be tolled during the pendency of the appeal. Petitioners cite no authority for their argument; they merely assert that tolling is 'implicit' in the fact that an appeal is allowed. As a rule, we lack authority to toll a limitation period in the absence of such authority expressed in the limitation itself. *See, e.g., Stupek v. Wyle Laboratories Corp.*, 327 Or 433, 445-46, 963 P2d 678 (1998). We reject petitioners' argument without further discussion."

In that case, the referenced LUBA appeal concerned the same application; in the OBO case, the zone change application that was appealed was an entirely different application than the site review application, which was not appealed.

Eugene Code has no limitation on effective dates related to LUBA appeals, with respect to either site review or zone change approvals, and the City's final orders on SR 11-2 and Z 10-9 contain no such limitation either.

Thus, before approving this application, the Planning Director must explain the why the Court of Appeals decision does not apply to this case.

The Planning staff contention that the site review effective date was determined by the date the LUBA appeal of the zone change was resolved is without merit. The site review application was not dependent in any way on the zone change; and, even if it were, the

zone change's effective date was not delayed because of the LUBA appeal. Thus, under any circumstances, the site review approval expired no later than May 15, 2013 (i.e., 18 months after the zone change was approved on November 15, 2011).

The applicant did not file the MDA 13-7 application prior to the expiration of the site review approval, and therefore the application must be denied.

It bears pointing out that, the applicant bears the burden to be aware of the legal requirements related to site review approval expiration. If the applicant wanted to challenge the effective date established by EC 9.7220, he was required to file a local appeal of the Hearings Official's decision and contest the effective date (which was also stated in the Notice of Hearings Official). The applicant did not do that, and thus he did not preserve his right to contest the effective date.

Furthermore, the applicant was given a second opportunity to challenge the effective date when he signed the original performance agreement. LUBA has repeatedly held that a party cannot base an appeal on the fact that they received misinformation from a staff person. The party is responsible for knowing the law. The applicant in this case had a former Eugene Hearings Official as his attorney, and thus has no legal or practical excuse for not knowing the effective date established by EC 9.7220. Despite all that, the applicant "freely and voluntarily" agreed that the effective date was October 18, 2011 and did not raise the issue of the effective date until the date the site review approval expired had long since passed.

Thus, the applicant has no basis upon which to require the City to alter the April 18, 2013 expiration date seven months after that date. Furthermore, a City planner has no basis for, and cannot legally, simply chose to alter the expiration date, as Gabe Flock has attempted.

The MDA 13-7 Application Was Filed December 2, 2013

The applicant and City staff claim that the site review approval expired on November 30, 2013. There is no evidence in the application or the record to support such a claim, other than reference to an altered Performance Agreement, which was signed on November 21, 2013 for the City by Gabe Flock, the same individual who had previously signed the original Performance agreement, in which both he and the applicant agreed that the expiration date was April 18, 2013. (Mr. Flock is an experienced senior planner who is highly familiar with Eugene Code and can therefore be presumed to have known the correct effective date when he signed the first Performance Agreement.)

This altered Performance Agreement introduced for the first time the unsupported claim regarding the zone change, but there is no citation to Eugene Code, statutes or case law that provides the authority for a staff member to effectively contravene the code provisions. No explanation for Mr. Flock's actions in doing so is provided, nor

were any parties concerned with the OBO applications provided any notice of this last-minute, *ad hoc* contravention of Eugene Code.

As amply demonstrated in the prior sections of this testimony, Mr. Flock's actions were unlawful and did not legitimately change the expiration date for the site review approval.

However, assuming for sake of further argument (but not granting), that the expiration date was November 30, 2013; nevertheless, the applicant did not properly file the MDA 13-7 application until December 2, 2013; and thus, the application was filed after the site review approval expired, even by the City's own concocted date.

The facts are that on November 27, 2013, documents were presented to the City that did not meet the criteria for filing an application, which are specified in Eugene Code:

EC 9.7010 Application Filing.

Applications shall be submitted on a form approved by the city manager, be accompanied by a fee established pursuant to EC Chapter 2, and be signed by the property owner, unless the applicant is a public agency, in which case the signature of the property owner is not required.

Neither the submitted form, nor any other documents submitted on November 27, 2013 were signed by the property owner nor were the submitted documents accompanied by the required fee.

The property owner apparently took back possession of the form (when or for how long is not known), signed and dated it on December 2, 2013 and submitted the form along with the required fee on December 2, 2013.

Thus, the requirements to properly file an application were not met until after the November 30, 2013 expiration date that the City claims.

City staff assert the filing date of the application was November 27, and the fact that what was submitted did not meet the filing requirements in EC 9.7010 is of no consequence because the submitted documents represented an "incomplete application," which staff dealt with according to the provisions of **EC 9.7015 Application Completeness Review.**

However, that treatment is misdirected. The issue here is that Eugene Code has minimal requirements to properly file an application, as well as more extensive requirements for an application to be complete. The standard practice of the City when an application is incomplete is: a) to retain possession of the application that was filed, and b) send a letter to the applicant requesting the additional information. Notably, the application is not re-filed.

In this case, that's not what happened. The documents submitted on November 27, 2013 were not properly filed. The applicant re-submitted documents that met the filing requirements on December 2, 2013 and the City in turn stamped the form and other documents with their actual filing date of December 2, 2013.

Both the facts and the City's actions distinguish these circumstances from an "incomplete application."

Further, if the City's assertion were to apply broadly, a single sheet of plain paper with "Modify Site Review Approval" and a phone number scribbled on it could be submitted to establish the filing date of an "application," and the required City form, owner's signature and fee could be submitted, along with other documents, up to 180 days later, according to the completeness requirements and deadlines specified in EC 9.7015. Thus, the staff's interpretation impermissibly leads to an absurd and unreasonable result. (*State v. Galligan*)

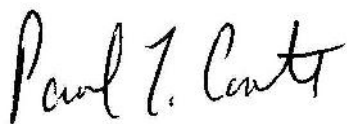
City staff may argue that the filing requirements are not "jurisdictional requirements" for an application, and therefore the application must be considered. However, Eugene Code doesn't explicitly distinguish any "jurisdictional requirements" for land use applications. Eugene Code achieves this intent by separating the minimal requirements to properly file an application from the more extensive requirements for a "complete" application, and the code provides an explicit process for dealing with the latter case; whereas the only reasonable consequence of not meeting the filing requirements is that an application is not filed until it's on the approved form, signed by the property owner and accompanied by the fee.

In this case, the filing date for the MDA 13-7 application was after the site review approval had expired, even if the City's manufactured date were legitimate.

Conclusion

For the reasons cited above, the application for MDA 13-7 was filed after the site review approval for SR 11-2 had expired and the application cannot be considered.

Submitted by,



Paul Conte

January 27, 2014


**Planning & Development
Planning**

City of Eugene
99 West 10th Avenue
Eugene, Oregon 97401
(541) 682-5377
(541) 682-5572 FAX
www.eugene-or.gov

APPEAL OF PLANNING DIRECTOR'S DECISION

This appeal form applies to appeals of interpretation of this Land Use Code made according to EC 9.0040(1) and to appeals to all Type II land use applications. The appeal of the Planning Director's decision provides for a review of an administrative decision by a higher review authority specified in this Land Use Code. The Planning Director's decision may be affirmed, reversed, or modified.

Please check one of the following:

Adjustment Review <input type="checkbox"/> Minor <input type="checkbox"/> Major <input type="checkbox"/> Code Interpretation <input type="checkbox"/> Hazardous Materials Review Historic Property <input type="checkbox"/> Alteration <input type="checkbox"/> Demolition <input type="checkbox"/> Moving <input type="checkbox"/> Variance	Modification <input type="checkbox"/> Conditional Use Permit <input type="checkbox"/> Planned Unit Development. <input checked="" type="checkbox"/> Site Review <input type="checkbox"/> Willamette Greenways Partition <input type="checkbox"/> Tentative Plan <input type="checkbox"/> Final Plat Planned Unit Development, <input type="checkbox"/> Final <input type="checkbox"/> Site Review	<input type="checkbox"/> Standards Review Subdivision <input type="checkbox"/> Tentative Plan <input type="checkbox"/> Final Plat <input type="checkbox"/> Traffic Impact Analysis Vacation <input type="checkbox"/> Improved Public R-O-W <input type="checkbox"/> Improved Public Easement <input type="checkbox"/> Unimproved Public R-O-W with Re-dedication
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City File Name: OBO Enterprises

City File Number: MDA 13-7

Date of Planning Director Decision: February 13, 2014

Date Appeal Filed: February 25, 2014

(This date must be within 12 days of the date of the mailing of the Planning Director's decision.)

☒ Attach a written appeal statement. The appeal statement shall include a written statement of issues on appeal and be limited to the issues raised in the appeal. The appeal statement shall explain specifically how the Planning Director's decision is inconsistent with applicable criteria. Please contact staff at the Permit and Information Center, 99 West 10th Avenue, (541) 682-5377, for further information on the appeal process.

- ☒ A filing fee must accompany an appeal of a Planning Director decision, with some exceptions for neighborhood groups. The fee varies depending upon the type of application and is adjusted periodically by the City Manager. Check with Planning staff at the Permit and Information Center to determine the required fee or check on the web at: www.eugeneplanning.org

Acknowledgment

I (we), the undersigned, hereby acknowledge that I (we) have read the above appeal form, understand the requirements for filing an appeal of a planning director decision, and state that the information supplied is as complete and detailed as is currently possible, to the best of my (our) knowledge.

APPELLANT

Name (print): **Paul T. Conte**

Phone: **541.344.2552**

Address: **1461 W. 10th Ave.**

City/State/Zip: **Eugene, OR 97402**

Signature: Paul T. Conte

APPELLANT

Name (print):

Phone:

Address:

City/State/Zip:

Signature:

IF this appeal is being filed by the affected recognized neighborhood association, complete the following:

Name of Association:



FINDINGS AND DECISION OF THE PLANNING DIRECTOR:

APPROVAL OF A SITE REVIEW MODIFICATION FOR OBO ENTERPRISES (MDA 13-7)

Application Summary:

Modification (MDA 13-7) to extend the expiration period of an existing Site Review (SR 11-2) approval to May 30, 2015

Applicant(s):

OBO Enterprises, LLC and JLO Properties, LLC

Applicant's Representative:

Kristen Taylor, TBG Architects and Planners (541) 687-1010

Lead City Staff:

Becky Taylor, Associate Planner, Eugene Planning Division, (541) 682-5437

Subject Property and Location:

Tax Lots 400, 500, and 600 of Assessor's Map 17-03-32-33; located at 631, 647, and 669 East 15th Avenue, on the north side of East 15th Avenue, between Hilyard Street and Patterson Street

Relevant Dates:

Application originally submitted on November 27, 2013; deemed complete on January 3, 2014; decision granting approval issued on February 13, 2014

Background and Present Request:

The subject property is approximately 30,492 square feet (0.7 acre) of property located on the north side of East 15th Avenue, between Hilyard Street and Patterson Street. The site is currently developed with an older apartment complex with associated parking area and two single-family residences. The applicant obtained local approval (i.e. concurrent Zone Change, Z 10-9, Site Review, SR 11-2, and Adjustment Review, ARA 11-6, applications) to redevelop the site with a four-story, 63-unit apartment complex with a basement parking garage.

The Zone Change was subsequently appealed by the neighborhood association to the Land Use Board of Appeals (LUBA), but the Site Review and Adjustment Review applications were not. LUBA upheld the local approval (of the Eugene Hearings Official, as modified on appeal by the Eugene Planning Commission). The issue at hand is the effective and expiration dates of the Site Review, as it was processed concurrent with the Zone Change, which was further delayed via the appeals. The

applicant's current request is to extend the expiration period to May 30, 2015. A brief history of the applications is as follows.

The applicant initially requested zone change approval from R-3 Limited High-Density Residential to R-4/92 High-Density Residential with a density limitation of 92 units per acre, consistent with the proposed apartment development, rather than the 112 units per acre normally allowed by the R-4 zone. The Metro Plan designates the subject property as High-Density Residential; both the R-3 and R-4 zones implement that designation. The applicable refinement plan, the West University Refinement Plan (WURP), identifies the properties as appropriate for Medium and High-Density Residential uses, which is further described as being a buffer area between the campus high-density housing area to the east and the "woonerf" residential area to the west.

Although the WURP does not explicitly direct the application of the /SR, Site Review overlay zoning to the subject property, based on the reference to the subject property being a buffer area, staff recommended during the completeness review process that the applicant include a Site Review overlay to the requested zone change. Accordingly, the applicant amended its application package to include the /SR overlay and to process a Site Review application for the proposed development concurrent with the Zone Change. The applicant willingly proposed this proactive approach as a means to place limitations on the proposed development to further assure the role of the site as being part of a buffer area.

On October 3, 2011, the Eugene Hearings Official approved the concurrent Zone Change (Z 10-9), Site Review (SR 11-2), and Adjustment Review (ARA 11-6) applications, applying the /92/SR overlays to the R-4 zone and establishing four conditions of Site Review approval. Despite the concurrent Site Review and proposed limitations on the Zone Change request, the West University Neighborhood Association (WUNA) opposed the R-4 zone. The neighborhood expressed concern about the potential impacts of increased residential density on the existing neighborhood, and further asserted that R-4 is inconsistent with certain Metro Plan and WURP policies. The South University Neighborhood Association (SUNA) also objected to the zone change from R-3 to R-4, fearing that the decision would enable similar up-zones in their neighborhood.

The West University Neighbors appealed the Zone Change to the Planning Commission, which modified the Hearings Official's approval with the following condition of approval:

The maximum number of bedrooms on the site shall be limited to 107, based on the definition of "bedroom" that is included in EC 9.0500 at the time of this order and attached as Exhibit A. Approval through the City's zone change process will be required to lift or modify this cap on the number of bedrooms.

The introductory comments provided in the Planning Commission's Final Order, dated November 15, 2011, include the following: **"If the zone change is affirmed,** the approved site review and adjustment review applications would allow the applicant to construct the four-story, 63-unit apartment complex with a basement parking garage as proposed and approved in SR 11-2 and ARA 11-6." (*Emphasis added*). This is an important factor to consider in this case because it establishes a basis for the City's determination that the applicant could not have fulfilled the conditions of the Site Review without resolution of the Zone Change, which, as mentioned above, was subsequently appealed to LUBA.

The Zone Change approval was affirmed by LUBA on May 30, 2012. LUBA's opinion became final 21 days later, on June 20, 2012, when the timeline for filing an appeal to the Oregon Court of Appeals expired. It is staff's position that because the Site Review is contingent on the Zone Change, and the Zone Change did not become final until June 20, 2012, the "effective date of approval" of the Site Review for purposes of determining the expiration date, is also June 20, 2012. According to EC 9.7230 Expiration, Site Review approvals are effective for 18 months after the "effective date of approval," which in this case would be December 20, 2013. EC 9.7230(6) states that "Prior to the expiration date, the applicant may submit a modification requesting a change to the commencement or expiration time period." As noted above, the applicant submitted a modification on November 27, 2013.

Another important distinction in this case is that the expiration periods cited above pertain to Type II applications approved by the Planning Director. In this case, the subject Site Review was approved by the Hearings Official as a Type III application; hence it is staff's position that, upon further review of the applicant's request and related testimony, this particular Site Review application has no expiration date. EC 9.8005(2) states that: "If an initial proposal also requires an application be submitted for one or more of the following... (b) Site Review; (e) Zone Change; ...the applicant may elect to have the applications reviewed concurrently according to the highest application type. All other provisions of this code would continue to apply to each application, including, but not limited to, the approval criteria."

The Site Review required the Zone Change, thus the applicant processed the applications concurrently according to the Type III procedures. The "other provisions" that "would continue to apply" to the Site Review would not be the Type II procedures, which include notice, decision, notice of decision, and expiration. The "other provisions" that "would continue to apply" would be those specific to Site Review, beginning at EC 9.8425, which include applicability, general requirements, approval criteria (and the referenced development standards), final site plan approval, and modifications to approved plans. EC 9.7340(1) states: "Approval of a Type III application shall not expire except as provided in subsections (2) through (4)..." None of the exceptions set forth in subsections (2) through (4) applies in this case. Accordingly, the Site Review approval has no applicable expiration date.

Further, even assuming an expiration date applies, from a common-sense perspective, a developer should not be required to move forward on a Site Review application until it knows that the underlying Zone Change is valid. The rationale LUBA relied on in a similar case applies here:

"To require the applicant to commence construction within one year of local approval, notwithstanding subsequent appeals of that approval, would require applicants for conditional use proposals to either start construction without knowing whether their application would be approved on appeal, or risk loss of the approval if appeals extend beyond one year following the local approval. If an appeal is ultimately successful, and the local approval is overturned, an applicant who commences construction to comply with the one-year requirement would have commenced, and possibly completed, illegal development. Conversely, if ultimately unsuccessful appeals take more than one year, but the applicant does not take the risk of building without final approval on appeal, when the approval is final following the appeals, the approval is void for failure to timely commence construction. Each of these results is absurd." *Friends of Metolius v. Jefferson County*, 31 Or LUBA 160, 163-64 (1996).

The facts are slightly different here because the Site Review approval was not itself appealed. However, the practical effect is the same, because the Site Review approval was effectively, if not legally, contingent on the Zone Change approval. This means the applicant could have proceeded with building permits at their own risk, pending resolution of non-local appeals (i.e. LUBA). However, the City would not require the applicant to take such a risk. In this case, the City interprets the “effective date of approval” to be the date upon which all appeals of the subject application, or of any application upon which the subject application relies, have been exhausted. In other words, the approval is effective for purposes of issuing building permits once the local decision becomes final (i.e., is not further appealed locally). So, if the developer wants to take the chance and move forward with getting building permits, he/she can, but the expiration timeline does not start running until all appeals are finalized.

Further, as noted previously, since the Site Review was processed under the Type III provisions, it is questionable whether there is any applicable expiration date. If the Type II expiration date for Site Review applies, then it would be 18 months from the “effective date of approval” of the Site Review decision which in this case was June 20, 2012.

The *Rest-Haven* case, cited by opponents, does not apply. First, that case dealt with language in an implementing administrative rule, which was worded differently than the code provision at issue in this case. Further, the parties in that case were not arguing about when the clock for determining expiration began running, based on an interpretation of language in the code. They were arguing that the expiration period was tolled pending appeal. That is not the City’s argument or rationale in this case. Accordingly, that case is not controlling.

Public Notice and Referrals:

Public notice of the modification application was mailed on January 13, 2014, in accordance with procedural requirements of EC 9.7210. In response to this public notice, comments were received from Carolyn Jacobs and Bill Aspegren of the South University Neighborhood Association, Paul Conte, and William Kabeiseman representing Mr. Conte. Ms. Jacobs submitted, via email, a voicemail recording from Steve Ochs about the City’s position on the expiration date and MDA filing. EC 9.7210(3) limits public comments to “the submission of written comments,” although staff has copied the recording on a CD for the application file. Mr. Aspegren and Mr. Conte assert that the subject modification was submitted after the Site Review approval had expired and, therefore, was not timely filed and must be denied.

Mr. Conte’s supporting arguments about the date the application was filed versus the date the application was deemed complete with proper signatures and filing fee are irrelevant based on staff’s position regarding the “effective date of approval”. Mr. Conte asserts that the effective date of the Site Review approval is October 18, 2011, the 13th day (the appeal period) following the Hearings Official’s approval of the Site Review on October 3, 2011. As discussed previously, staff contends that, because the Site Review application was processed as a Type III application, there is no expiration date. However, even if an expiration date applies, it should be based on the date that all appeals of the Zone Change were exhausted, on June 20, 2012. If the Type II expiration date applies to the Site Review, it would be 18 months from June 20, 2012, or December 20, 2013.

Staff notes that Mr. Conte's arguments regarding the Performance Agreement are irrelevant here, as that is a contract between the City and the Developer, which is not enforceable by a third party. Moreover, the Performance Agreement is not being modified through the subject application; that contract can be modified by the affected parties. Admittedly, the various dates of the Performance Agreements are confusing; the bottom line is that this contract cannot supersede code requirements. The applicant's request for modification is based on EC 9.7230(6), which states that "....Prior to the expiration date, the applicant may submit a modification requesting a change to the commencement or expiration time period."

As an argument against using the June 20, 2012 date for determining the expiration date for the Site Review approval, Mr. Conte claims that because the City *allows* developers to proceed with development permits upon a local approval while further appeals are in process, the applicant could have submitted development plans prior to the Site Review expiration date. Staff notes that this allowance is with the understanding that it is at the developer's risk; the City would not *require* a developer to take such a risk. Mr. Conte also argues that the Site Review approval was not conditioned upon the Zone Change; again, staff notes that the two applications were processed concurrently because the Site Review required the Zone Change. The Hearings Official would not have conditioned the Site Review on approval of the Zone Change, because he approved both requests concurrently.

Mr. Kabeiseman supports Mr. Conte's arguments by relying on the *Rest Haven* case and the City's practice of allowing applicant's to risk submitting development permits while LUBA appeals are pending. The City's responses to these arguments are provided above (see pages 3 and 4).

Referral comments on the application were also requested from various affected service providers and City departments. Referral comments received by the Planning Division on this application all confirm that the requested modification presents no concerns.

Evaluation:

The following findings demonstrate that the proposed modification to the approved Site Review will comply with all applicable approval criteria as set forth in EC 9.8455. The approval criteria are listed below in **bold**, with findings addressing each.

EC 9.8445(1): The proposed modification is consistent with the conditions of the original approval.

The requested modification for a timeline extension is consistent with the conditions of the original approval as none pertained to time.

EC 9.8445(2): The proposed modification will result in insignificant changes in the physical appearance of the development, the use of the site, and impact on the surrounding properties.

The subject modification only concerns the extension of the approval effective date. No change to the use, outward appearance or impact on surrounding properties is proposed from what was originally approved. Therefore, the modification meets this criterion of approval.

Decision:

Based upon the findings and condition set forth above, it is concluded that the proposed Site Review Modification complies with the applicable approval criteria set forth at EC 9.8445. Approval of the applicant's requested timeline extension is therefore granted.

Post-Approval:

Pursuant to EC 9.7220(4), the Planning Director's decision regarding this Type II application is effective on the 13th day after notice of this decision is mailed, unless appealed according to the procedures in EC 9.7605.

Approval Date:

2/13/14

Approval Granted By:

Gabe Flock

Gabe Flock, Senior Planner
For the Eugene Planning Director